1998

STOUFFER FOOD CORPORATION and LIBERTY MUTUAL INSURANCE CO., Petitioners, v. UTAH LABOR COMMISSION, EMPLOYERS REINSURANCE FUND, and KATHLEEN MAE MOORE, surviving spouse of William Moore (deceased), Respondents : Brief of Respondent

Utah Court of Appeals

Sandra N. Dredge; Attorney for Respondent; Erie V. Boorman; Alan H. Hennebold.
Michael E. Dyer; Dori K. Petersen; Attorney for Petitioners.

IN THE UTAH COURT OF APPEALS

STOUFFER FOOD CORPORATION and LIBERTY MUTUAL INSURANCE CO.,	)	
Petitioners,	)	Case No. 980227-CA
v.	)	Priority No. 7
UTAH LABOR COMMISSION, EMPLOYERS REINSURANCE FUND, and KATHLEEN MAE MOORE, surviving spouse of William Moore (deceased),	)	
Respondents.	)	

BRIEF OF RESPONDENT UTAH LABOR COMMISSION

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JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §34A-2-801 (1979), Utah Code Ann. §63-46b-16 (1988), Utah Code Ann. §78-2a-3 (1996), and Utah Rule of Appellate Procedure 14.

ISSUES AND STANDARD OF REVIEW

Although the brief of Stouffer Food and Liberty Mutual Insurance company enumerates two issues for review by the Court, the Utah Labor Commission ("Commission") believes that the issues are better addressed together.

1. After The 1979 Amendments To Utah Code Ann. §35-1-68, Is The Employer And/Or The Employer's Insurance Carrier liable For Continued Death Benefits To The Dependents Of A Deceased Covered Employee After 312 Weeks Of Receiving Such Benefits, Or Is The Employers' Reinsurance Fund Liable For Such Continued Benefits ?

Standard of Review: The Labor Commission agrees that this appeal concerns an issue of statutory construction which should be reviewed under a "correction of error" standard. Brown & Root v. Industrial Commission, 947 P. 2d 671 (Utah 1997).

STATEMENT OF THE CASE

The Commission adopts the statement of the case, including the statement of facts, set forth in Stouffer Food's Brief.

SUMMARY OF THE ARGUMENT

Utah Code Ann. §35-1-68 was amended in 1979 by the 43rd legislature in Senate Bill 111 with the specific legislative intent to shift liability for ongoing death benefits for surviving

dependants, after 312 weeks, from the Employers' Reinsurance Fund to the employer and/or the employer's insurance carrier. Floor Debate February 16, 1979, 43rd Legislature [Commission's Exhibit "1"]. The legislature in passing Senate Bill 111, the 1979 amendment to Utah Code Ann. §35-1-68, specifically found that the Employers' Reinsurance Fund was, at that time, in danger of insolvency unless liability for ongoing death benefits after 312 weeks was shifted from the Employers' Reinsurance Fund to the employer and/or the employer's insurance carrier. [*id.*].

Contrary to Stouffer's interpretation, this Court in Hales found that after 1973, Utah Code Ann. §35-1-70 became a vestigial appendage to Utah Code Ann. §35-1-68, and that Utah Code Ann. §35-1-70 had escaped legislative repeal only by an oversight. Hales v. Industrial Commission, 854 P. 2d 537, 542 f.n. 7 (Utah Ct. App. 1993). Utah Code Ann. §35-1-70 became irrelevant after 1973 and is of no help to Stouffer. *Id*.

ARGUMENT

THE 1979 AMENDMENT TO UTAH CODE ANN. §35-1-68 WAS SPECIFICALLY CRAFTED TO SHIFT LIABILITY FOR DEATH BENEFITS AFTER 312 WEEKS FROM THE EMPLOYERS' REINSURANCE FUND TO THE EMPLOYER AND/OR THE EMPLOYER'S INSURANCE CARRIER.

Stouffer's arguments are largely dependant on an attempt by Stouffer to divine a legislative intent consistent with Stouffer's position by marshaling an involute arrangement of various sections from Utah Code Ann. §35-1-68 and Utah Code Ann. §35-1-70. Such an exercise is unnecessary as the relevant legislative intent is readily accessible.

The Utah Senate floor debate record from the 43rd legislature for February 16, 1979, sets forth the comments of Senators Cornaby and Bunnell concerning the purpose of Senate Bill 111, which bill amended Utah Code §35-1-68 :

Cornaby: Senate Bill 111 comes to us from the State Industrial Commission and is entitled Workman's Compensation. The purpose of the bill is to correct an inequity which has arisen in the so called "second injury fund". Now this is the fund that pays benefits to spouses and dependants of covered workers who were killed in employment. At the present time the fund has become actuarially unsound and is getting further into an unsound position. The purpose of the of this bill is to correct that situation by transferring the, by shifting the burden from the "second injury fund". The Industrial Commission has worked on this bill for the past year and have finally worked this solution to the problem. The bill is essential from this standpoint that if this not done we will find our "second injury fund" in a bankruptcy situation. I think senator Bunnell has a comment.

****

Bunnell: As I understand this bill, first it takes the spouse, the beneficiary out of the second injury fund and requires that the employer or the insurance company who had the original insurance will have to continue to pay those benefits ..... That's roughly the purpose of this, and if we don't do that there isn't going to be any money in the second injury fund to pay anyone so I would urge the support of this bill.

Floor Debate February 16, 1979, 43rd Legislature [Commission's Exhibit "1" *emphasis added*].

From the plain, simple statements of the legislative proponents of SB 111, the 1979 amendment to Utah Code Ann. §35-1-68, there is no question that the legislative intent and purpose of the bill was to relieve the Employers' Reinsurance Fund ("second injury fund") of any continued liability for death benefits under the statute, while in turn shifting that liability to the employer or the employer's insurance carrier. This in fact was the sole purpose of the 1979 amendment to Utah Code §35-1-68 because the Employers' Reinsurance Fund ("second injury fund") was actuarially unsound and facing bankruptcy. *Id*

With the straightforward legislative purpose of SB 111 set forth, the analysis of the provisions of Utah Code Ann. §35-1-68 (1979) provided by the Administrative Law Judge in the

Order dated December 18, 1997 (Stouffer's Exhibit "2"), and as adopted by the Appeals Board in its order of March 27, 1998, (Stouffer's Exhibit "3"), offers the only logically consistent analysis of the relevant code sections. Judge Elicerio correctly concludes that the 1979 amendment to Utah Code Ann. §35-1-68 deletes or removes "Language, previously in the statute, specifically stating that the special fund (or ERF) was to pay continuing benefits" [Order of Judge Elicerio, December 18, 1997, (Stouffer's Exhibit "2" p. 105), *citing* Laws of Utah, 1979, Ch. 138, p.778, subsection (2) (d) interlined language, (Commission's Exhibit "2")]. Judge Elicerio also observes that the 1979 amendment to Utah Code Ann. §35-1-68 reorganizes " [t]he subsections, to place the new language regarding payment of continuing benefits under the general language describing the liability of the employer/carrier" [Order of Judge Elicerio, December 18, 1997, (Stouffer's Exhibit "2" p. 105), *citing* Laws of Utah, 1979, Ch. 138, p.778, subsection (2) (b) (ii) interlined language, [Commission's Exhibit "2")]. The 1988 amended version of Utah Code Ann. §35-1-68 referenced by Stouffer, contains nothing that would alter the 1979 amendment's transfer of liability for continued death benefits from the Employers' Reinsurance Fund to the employer or the employer's insurance carrier that was effected by the 1979 amendment.

Stouffer tries to argue that the following language in Utah Code Ann. §35-1-68 (1) (1988) indicates that the 1979 amendment did not shift liability for continuing death benefits from the Employers' Reinsurance Fund to the employer or the employer's insurance carrier:

> There is created an Employers' Reinsurance Fund for the purpose of making payments in accordance with Chapters 1 and 2, Title 35. This fund shall succeed to monies previously held in the "Special Fund", the "Combined Injury Fund", or the "Second Injury Fund".

Stouffer contends that since the Employers' Reinsurance Fund was statutorily created to "make payments", those payments must necessarily be the continued payment of death benefits after 312 weeks for new cases arising after the 1979 amendment. [Stouffer's Brief p.12]. Stouffer's non sequitur ignores the fact that the Employers' Reinsurance Fund was created to succeed to the "Special Fund", the "Combined Injury Fund", and the "Second Injury Fund", and therefore the Employers' Reinsurance Fund succeeded to the liabilities incurred by those funds prior to the 1979 amendment. Certainly the Employers' Reinsurance Fund would have to make payments, namely those ongoing payments for liabilities incurred prior to the 1979 amendment to Utah Code Ann. §35-1-68.

Stouffer next asserts that the requirements contained in Utah Code Ann. §35-1-68 (2) (d) (1988) demonstrate that the statute logically requires the Employers' Reinsurance Fund to continue to fund continuing death benefits because, Utah Code Ann. §35-1-68 (2) (d) (1988) requires the employer to pay to the Employers' Reinsurance Fund the difference between $30,000 and what the employer actually paid to the decedent employee's dependants prior to the termination of dependency. [Stouffer's Brief p. 14]. Stouffer maintains that the statute would not require the employer to help finance the Employers' Reinsurance Fund if the Fund did not continue to incur new liability for death benefits. *Id.*

Stouffer fails to mention the fact that the provisions in Utah Code Ann. §35-1-68 (2) (d) (1988) were deleted in the 1990 amendment to the statute *See:* Laws Of Utah, 1990, Ch. 110, pp 404-405 [Commission's Exhibit "3"]. The 1990 amendment is some four years prior to the 1994 amendment, which 1994 amendment Stouffer contends was the actual amendment relieving the Employers' Reinsurance Fund of liability for continuing death benefits [Stouffer's Brief p. 16].

Under Stouffer's reasoning, in 1990 the legislature stripped the Employers' Reinsurance Fund of its financing source for the payment of continuing death benefits some four years before the Employers' Reinsurance Fund was relieved of liability for paying the same benefits. As indicated earlier, the Employers' Reinsurance Fund did continue to have some responsibility for prior incurred liability, which more logically accounts for the legislature delaying the removal of the funding provisions contained in former Utah Code Ann. §35-1-68 (2) (d) (1988) until 1990. Stouffer's reliance on Utah Code Ann. §35-1-68 (2) (d) (1988) is without any compelling significance.

Stouffer, next urges that because the 1994 amendment to Utah Code Ann. §35-1-68 specifically references the employer and the insurance carrier in Subsection (5) (a) (ii) that this is the amendment that was intended to finally shift liability for death benefits from the Employers' Reinsurance Fund to the employer or the employer's insurance carrier. As stated by the Administrative Law Judge, the specific reference to the employer and the employers' insurance carrier contained in Utah Code Ann. §35-1-68 (5)(a) (ii) (1994) merely clarified what had been a fact since the 1979 amendment.

Stouffer's most puzzling argument is Stouffer's simultaneous reliance on Utah Code Ann. §35-1-70 (1953) together with the case Hales v. Industrial Commission of Utah, 854 P. 2d 537 (Ut. Ct. App. 1993). Stouffer contends that Utah Code Ann. §35-1-70 (1953) specifically places liability for continuing death benefits on the Employers' Reinsurance Fund and limits the liability of the employer and or the employer's insurance carrier. [Stouffer's Brief p. 12 -13, 16]. Apparently, Stouffer overlooked foot note 7 of the Hales case which pointedly observes:

> Admittedly, under the present statutory scheme in which the extension of benefits beyond the six-year period is no longer discretionary with the Commission so long as death benefit recipients remain dependent, section [35-1-]70 would rarely, if ever,

> be applied It appears the section escaped repeal, as no longer necessary, by virtue of separate section status As a glance at the annotation notes will show, the legislature has repeatedly tinkered with section [35-1-]68, unmindful that, from 1973 on, those changes rendered section [35-1-]70, to which no particular legislative attention seems to have been paid for over seven decades, quite unnecessary

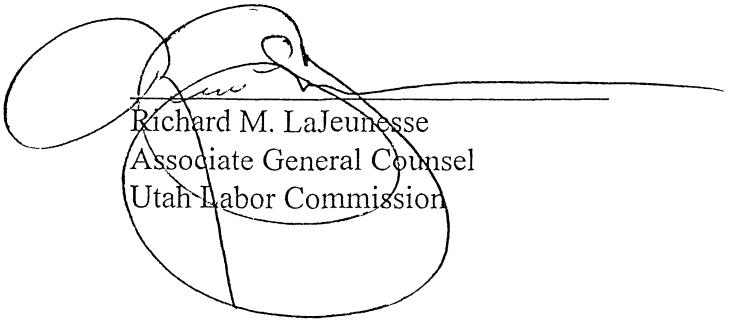
Hales v Industrial Commission of Utah, 854 P 2d at 542 fn 7 [emphasis added] It is obvious that Utah Code Ann §35-1-70 is a vestigial artifact that from 1973 on has "escaped repeal" even though it is wholly unnecessary *Id* *See also* Order of Administrative Law Judge dated December 18, 1997, Stouffer's Exhibit "2" p 106 (Judge Elicerio observes that "[t]he legislature did not mean for this section to specify liability for ERF following the initial 312 weeks of death benefits, after the legislature created employer/carrier liability for these continuing benefits in 1979 To read it otherwise would mean that the legislature intended to have two mutually exclusive provisions to be in existence, one specifying employer/carrier liability for the continuing benefits and the other specifying ERF liability for the same benefits ")

Stouffer again attempts to salvage its position by interpreting the Hales case as somehow supporting the proposition that the Employers' Reinsurance Fund is liable for continuing death benefits under post 1979 Utah Code Ann §35-1-68 (Stouffer's Brief pp 17-18) Stouffer quotes foot note 5 of Hales in its entirety but, disregards the preface to the foot note wherein the Court states "We express no definite opinion on the issue likely to resurface on remand, namely, whether petitioners' claim should have been asserted against the fund " Hales v Industrial Commission of Utah, 854 P 2d at 542 fn 5 The Court in Hales unambiguously disclaims issuing an opinion on the liability of the Employers' Reinsurance Fund under Utah Code Ann §35-1-68 Stouffer cannot side step the Court's own disclaimer in Hales

CONCLUSION

The plainly stated intent of the Utah Legislature in passing Senate Bill 111, the 1979 amendment to Utah Code Ann. §35-1-68, was to rescue an insolvent fund by shifting liability for continuing death benefits under the act from the Employers' Reinsurance Fund to the employer and or the employer's insurance carrier. It makes little sense that the legislature, having announced its purpose for propounding Senate Bill 111, to proceed and pass an amendment that in effect left the Employers' Reinsurance Fund liable for ongoing death benefits under the statute while on the road to bankruptcy. After the 1979 amendment, Utah Code Ann. §35-1-68, can only reasonably be read to shift liability for newly incurred death benefits from the Employers' Reinsurance Fund to the employer and or the employer's insurance carrier. The Court of Appeals should dismiss Stouffer's appeal and affirm the Order of the Appeals Board of the Utah labor Commission.

Submitted this 29 day of July, 1998.



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CERTIFICATE OF MAILING

I hereby certify that on the 21 day of July, 1998, two copies of the forgoing Brief of Respondent Utah Labor Commission, were mailed, first class, postage prepaid to the following:

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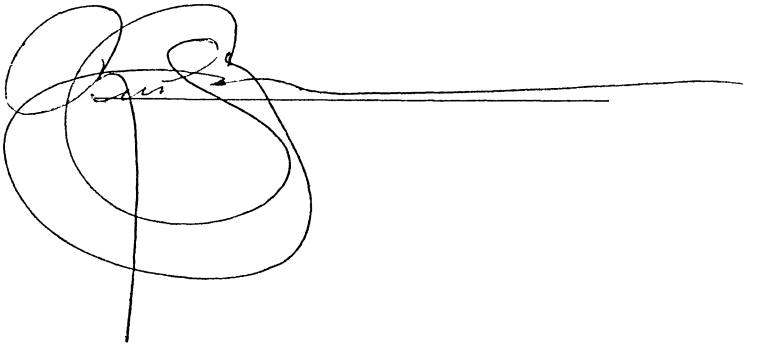

Tab 1

Legislative Excerpt
February 16, 1979
Senate Bill 111
Senators Cornaby and Bunnell

President: ....Second reading calendar, Senate Bill 111.

Clerk: Senate Bill number 111, Workman's Compensation by Senator Cornaby. The report reads Mr. President the [inaudible] Committee on Business, Labor and Economic Development which was referred Senate Bill 111, Workman's Compensation by Senator Cornaby, has carefully considered the bill and reports the same out favorably. Respectfully Senator Arnold Christensen, Committee Chairman.

President: Senator Asay

Asay: I move that we adopt the committee report

President: You've heard the motion that we adopt the committee report. Discussion. All in favor of the motion say aye.

Group: Aye

President: Those opposed, no. The motion carries. The committee report is adopted. The bill is before us. Senator Cornaby.

Cornaby: Senate Bill 111 comes to us from the State Industrial Commission and is entitled Workman's Compensation. The purpose of the bill is to correct an inequity which has arisen in the so called second injury fund. Now this is the fund that pays benefits to spouses and dependents of covered workers who were killed in employment. At the present time the fund has become actuarially unsound and is getting further into an unsound position. The purpose of this bill is to correct that situation by transferring the, by shifting the burden from the second injury fund. The Industrial Commission has worked on this bill for the past year and have finally worked out this solution to the problem. The bill is essential from this standpoint that if this is not done we will find our second injury fund in a bankruptcy situation. I think Senator Bunnell had a comment.

President: Senator Bunnell. Is it a short comment?

Bunnell: Well, I can make it as short as you like. I think this is a good bill, if you want to pass it. There's some history behind this bill, I won't tell you all of it, but some years back, Senator Wadingham is gone, he was involved in this, the second injury fund, as I remember it, Steve Hadley over there can get me out of trouble if I don't explain it right, if a husband is killed then the, the spouse I beg your

pardon, is killed, then the state insurance fund, the surviving, I'll say widow, in this case, is paid compensation according to how much the husband made for six years. And that the cost of that is born by the employer. Now we cannot deny now, what we call the second injury fund in which we funded mostly through taxes on insurance policies and perhaps some other things that after the six year period if the wife is still dependent and if the children haven't reached maturity then the second injury fund took over and paid it from then on, there are also some other disabled people paid out of this but for the purposes of this bill, as I understand it we're only talking about surviving spouses. Back, when was this Steve, '65, '73 that's right we amended this bill and increased the benefits and at that time Lynn Richards who was the, kind of the godfather of the state insurance fund advised us that when they went on the second injury fund we should reduce their payments by the amount of their social security. Well we were kind of bleeding heart fellows and we wanted to take care of the widows so we refused to accept Lynn's recommendation and said that she was entitled to both the compensation and a full social security. Lynn pointed out that this might be more than she would have been entitled to if the husband was alive and he begged us not to do that and he said someday you'd break the fund and that's exactly what's happened. We've paid this out now for these six years and now the funds depleted to the point we have to do something about it. As I understand this bill, first it takes the spouse, the beneficiary out of the second injury fund and requires that the employer or the insurance company who had the original insurance will have to continue to pay those benefits and also the amount she receives from social security will be reduced from the payment so that she will get what she's entitled to but no more. That's roughly the purpose of this, and if we don't do that there isn't going to be any money in the second injury fund to pay anyone so I would urge the support of this bill.

President: Further discussion on senate bill 111

?????: Call for the question, Mr. President

President: The question has been called for on the second reading of senate bill 111. The questions is shall it be read a third time. Roll call vote.

CERTIFICATION

I hereby certify that this is a true transcript of the tape recording of the proceedings of the Utah Legislature regarding the second reading of Senate Bill 111 on February 16, 1979.

Sara Jenson
Legal Support Specialist
Utah Labor Commission

Tab 2

LAWS

of the

STATE OF UTAH, 1979

Passed at the

REGULAR SESSION

of the

FORTY-THIRD LEGISLATURE

Convened at the Capitol in the City of Salt Lake
January 8, 1979
and Adjourned Sine Die on
March 8, 1979

Published by Authority

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in sections 35-1-65, 351-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

Section 3. Section amended.

Section 35-1-68, Utah Code Annotated 1953, as amended by Chapter 57, Laws of Utah 1955, as amended by Chapter 62, Laws of Utah 1957, as amended by Chapter 55, Laws of Utah 1959, as amended by Chapter 71, Laws of Utah 1961, as amended by Chapter 49, Laws of Utah 1963, as amended by Chapter 68, Laws of Utah 1965, as amended by Chapter 65, Laws of Utah 1967, as amended by Chapter 86, Laws of Utah 1969, as amended by Chapter 76, Laws of Utah 1971, as amended by Chapter 67, Laws of Utah 1973, as amended by Chapter 101, Laws of Utah 1975, as amended by Chapters 151 and 156, Laws of Utah 1977, is amended to read:

35-1-68. Second injury fund created—Purpose—Funding—Injury causing death—Filing claim within one year—Payment into fund when no dependents—Payment to dependents—Presumptions of dependency—Payment to partially dependent persons—Effect of remarriage.

(1) There is created a second injury fund for the purpose of making payments in accordance with the provisions of chapters 1 and 2 of this title. This fund shall succeed to all monies heretofore held in that fund designated as the "special fund" or the "combined injury fund" and whenever reference is made elsewhere in this code to the "special fund" or the "combined injury fund" that reference shall be deemed to be to the second injury fund. The state treasurer shall be the custodian of the second injury fund and the commission shall direct its distribution. Reasonable administration assistance may be paid from the proceeds of that fund. The attorney general shall appoint a member of his staff to represent the second injury fund in all proceedings brought to enforce claims against it.

(2) In case injury causes death within the period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of the deceased as provided in section 35-1-81, and further benefits in the amounts and to the persons as follows:

~~[(1) If there are no dependents, the employer and insurance carrier shall pay into the state treasury the sum of $15,600. Any claim for compensation must be filed with the commission within one year from the date of death of the deceased, and, if at the end of one year from the date of death of the deceased, no claim for compensation shall have been filed with the commission, the said sum of $15,600 shall be paid at that time into the state trea-~~

~~sury by the employer or the insurance carrier. This payment shall be reduced by the amount of any weekly compensation payments paid to or due the deceased between the date of the accident and his death. Such payment shall be held in a special fund for the purposes provided in this title; the state treasurer shall be the custodian of such special fund, and the commission shall direct the distribution thereof. If the commission has reasonably determined that there are no dependents of the deceased, it may order the employer or insurance carrier to pay into the state treasury the sum specified in this subsection to be held in that special fund for a period of one year from the death of the deceased. Any claim filed within that year for which an award is made by the commission shall be paid out of the sum deposited by the employer or insurance carrier before any further claim may be asserted against the employer or insurance carrier.~~]

(a) If the commission has made a determination that there are no dependents of the deceased, it may, prior to a lapse of one year from the date of death of a deceased employee, issue a temporary order for the employer or insurance carrier to pay into the second injury fund the sum of $18,720. The $18,720 shall be reduced by the amount of any weekly compensation payments paid to or due the deceased between the date of the accident and death. Should a dependency claim be filed subsequent to the issuance of such an order and, thereafter, a determination of dependency is made by the commission, the award shall first be paid out of the sum deposited for credit to the second injury fund by the employer or insurance carrier before any further claim may be asserted against the employer or insurance carrier. In the event no dependency claim is filed within one year from the date of death, the commission's temporary order shall become permanent and final. If no temporary order has been issued and no claim for dependency has been filed within one year from the date of death, the commission may issue a permanent order at any time requiring the carrier or employer to pay $18,720 into the second injury fund. Any claim for compensation by a dependent must be filed with the commission within one year from the date of death of the deceased.

(b) (i) If there are wholly dependent persons at the time of the death, the payment by the employer or insurance carrier shall be 66 2/3% of the decedent's average weekly wage at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent minor child under the age of eighteen years, up to a maximum of four such dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week, to continue during dependency for the remainder of the period between the date of the death and not to exceed six years or 312 weeks after the date of the injury.

(ii) The weekly payment to wholly dependent persons during dependency following the expiration of the first six-year period described in subsection (2)(b)(i) shall be an amount equal to the weekly benefits paid to those wholly dependent persons during that initial six-year period, reduced by 50% of any weekly federal social security death benefits paid to those wholly dependent persons.

(iii) The issue of dependency shall be subject to review by the commission at the end of the initial six-year period and annually thereafter. If in any such review it is determined that, under the facts and circumstances existing at that time, the applicant is no longer a wholly dependent person, the applicant may be considered a partly dependent or non-dependent person and shall be paid such benefits as the commission may determine pursuant to subsection (2)(c)(ii).

(iv) For purposes of any dependency determination, a surviving spouse of a deceased employee shall be conclusively presumed to be wholly dependent for a six-year period from the date of death of the employee. This presumption shall not apply after the initial six-year period and, in determining the then existing annual income of the surviving spouse, the commission shall exclude 50% of any federal social security death benefits received by that surviving spouse.

[~~(3)~~] (c) (i) If there are partly dependent persons at the time of the death, the payment shall be 66 2/3% of the decedent's average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week, to continue during dependency for the remainder of the period between the date of death and not to exceed six years or 312 weeks after the date of injury as the commission in each case may determine and shall not amount to more than a maximum of [~~$15,600~~] $18,720. The benefits provided for in this subsection shall be in keeping with the circumstances and conditions of dependency existing at the date of injury, and any amount awarded by the commission under this subsection must be consistent with the general provisions of this title.

(ii) Benefits to persons determined to be partly dependent pursuant to subsection (2)(b)(iii) shall be determined by the commission in keeping with the circumstances and conditions of dependency existing at the time of the dependency review and may be paid in a weekly amount not exceeding the maximum weekly rate that partly dependent person would receive if wholly dependent.

(iii) Payments under this section shall be paid to such persons during their dependency by the employer or insurance carrier.

[~~(4)~~] (d) If there are wholly dependent persons and also partly dependent persons at the time of death, the commission may apportion the benefits as it deems just and equitable; provided, that the total benefits awarded to all parties concerned shall not exceed the maximum provided for by law. [~~Following the period during which the employer or its insurance carrier is required to pay benefits under this act, there shall be paid to such persons, during the period of their dependency, out of the special fund provided for in subsection (1), the same benefits as paid by the employer or its insurance carrier, as provided in subsection (2) and (3). The issue of dependency shall be reviewed at the time application is made for additional benefits from the special fund.~~]

[~~(5) The commission shall order that there be paid to such dependents, as provided in subsections (2) and (3), benefits at the rate of 66 2/3% of the deceased's average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of~~

~~the injury per week and not less than a minimum of $15 per week, out of that special fund provided for in subsection (1) and for that period of time beginning with the time that the payments to be made by the employer or its insurance carrier terminate and ending upon the termination of said dependency.~~]

[~~(6)~~] (e) If there are wholly or partly dependent persons at the time of death and the total amount of the awards paid by the employer or its insurance carrier to said dependents, prior to the termination of dependency, including any remarriage settlement, does not exceed [~~$15,600~~] $18,720, the employer or its insurance carrier shall pay the difference between the amount paid and the sum of [~~$15,600~~] $18,720 into the [~~special~~] second injury *fund provided for in subsection (1)*

Section 4. Section amended.

Section 35-1-71, Utah Code Annotated 1953, as amended by Chapter 151, Laws of Utah 1971, is amended to read:

35-1-71. Dependents—Presumptions—Determinations.

The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

[~~(1) A husband or wife upon a spouse with whom that individual lives at the time of the death.~~]

[~~(2)~~] (1) Children under the age of eighteen years or over such age, if physically or mentally incapacitated[~~,~~] and dependent upon the parent, with whom they are living at the time of the death of such parent, or who is legally bound for their support.

(2) For purposes of payments to be made under subsection (2)(b)(i) of section 35-1-68, a surviving husband or wife shall be presumed to be wholly dependent upon a spouse with whom he or she lived at the time of the employee's death.

In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury [~~resulting in the~~] or death of such employee, except for purposes of dependency reviews pursuant to subsection (2)(b)(iii) of section 35-1-68. [~~but no~~] No person shall be considered as a dependent unless he or she is a member of the family of the deceased employee, or bears [~~to him~~] the relation of husband or wife, lineal descendant, ancestor, or brother or sister. The word "child" as used in this title shall include a posthumous child, and a child legally adopted prior to the injury. Half brothers and half sisters shall be included in the words "brother or sister" as above used.

Section 5. Section amended.

Section 35-1-74, Utah Code Annotated 1953, as amended by Chapter 57, Laws of Utah 1955, as amended by Chapter 55, Laws of Utah 1959, as amended by Chapter 71, Laws of Utah 1961, as amended by Chapter 49, Laws of Utah 1963, as amended by Chapter 68, Laws of Utah 1965, as amended by Chapters 151 and 156, Laws of Utah 1977, is amended to read:

Tab 3

CHAPTER 110
H. B. No. 196
Passed February 21, 1990
Approved March 8, 1990
Effective April 23, 1990

LEGAL COUNSEL FOR THE INDUSTRIAL COMMISSION AND EMPLOYERS REINSURANCE FUND

By David S. Ostler

AN ACT RELATING TO LABOR; AUTHORIZING THE INDUSTRIAL COMMISSION TO RETAIN COUNSEL TO REPRESENT THE COMMISSION AND THE EMPLOYERS' REINSURANCE FUND; CLARIFYING THE DUTIES OF THE ATTORNEY GENERAL AND COUNTY AND CITY ATTORNEYS; AND MAKING TECHNICAL CORRECTIONS.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS:
35-1-32, AS LAST AMENDED BY CHAPTER 75, LAWS OF UTAH 1971
35-1-68, AS LAST AMENDED BY CHAPTER 116, LAWS OF UTAH 1988

Be it enacted by the Legislature of the state of Utah:

Section 1. Section Amended.

Section 35-1-32, Utah Code Annotated 1953, as last amended by Chapter 75, Laws of Utah 1971, is amended to read:

35-1-32. Attorney retained by commission — Duties of attorney general and county and city attorneys.

The commission may [~~with the approval of the governor appoint a representative to act as special prosecutor or to defend in any suit, action, proceeding, investigation, hearing or trial relating to matters within or concerning its jurisdiction~~] employ or retain counsel to represent the commission in proceedings to enforce actions of the commission or to defend the commission from actions brought against it. Upon the request of the commission, the attorney general [~~or~~], the county attorney, or city attorney of the [~~county~~] locality in which any investigation, hearing, or trial [~~had under the provisions of this title~~] is pending, in which the employee resides, or in which the employer resides or is doing business, shall aid [~~therein and prosecute, under the supervision of the commission, all necessary actions or proceedings for the enforcement of this title~~] in the representation of the commission.

Section 2. Section Amended.

Section 35-1-68, Utah Code Annotated 1953, as last amended by Chapter 116, Laws of Utah 1988, is amended to read:

35-1-68. Employers' Reinsurance Fund — Injury causing death — Burial expenses — Payments to dependents.

(1) There is created an Employers' Reinsurance Fund for the purpose of making payments in accordance with Chapters 1 and 2, Title 35. This fund shall succeed to all monies previously held in the &Special Fund," the &Combined Injury Fund," or the &Second Injury Fund." Whenever this code refers to the &Special Fund," the &Combined Injury Fund," or the &Second Injury Fund" that reference is considered to be the Employers' Reinsurance Fund. The state treasurer shall be the custodian of the Employers' Reinsurance Fund, and the commission shall direct its distribution. Reasonable administration assistance may be paid from the proceeds of the fund. [~~The attorney general shall appoint a member of his staff to represent the Employers' Reinsurance Fund in all proceedings brought to enforce claims against it~~] The commission may employ or retain counsel to represent the Employers' Reinsurance Fund in proceedings brought to enforce claims against or on behalf of the fund. Upon request of the commission, the attorney general shall aid in representation of the fund.

(2) If injury causes death within a period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of the deceased as provided in Section 35-1-81, and further benefits in the amounts and to the persons as follows:

(a) (i) If there are wholly dependent persons at the time of the death, the payment by the employer or its insurance carrier shall be 66-2/3% of the decedent's average weekly wage at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week, plus $5 for a dependent spouse, plus $5 for each dependent minor child under the age of 18 years, up to a maximum of four such dependent minor children, but not exceeding the average weekly wage of the employee at the time of the injury, and not exceeding 85% of the state average weekly wage at the time of the injury per week. Compensation shall continue during dependency for the remainder of the period between the date of the death and the expiration of six years or 312 weeks after the date of the injury.

(ii) The [~~weekly~~] payment to wholly dependent persons during dependency following the expiration of the first six-year period described in Subsection (2) (a) (i) shall be an amount equal to the weekly benefits paid to those wholly dependent persons during that initial six-year period, reduced by 50% of any weekly federal Social Security death benefits paid to those wholly dependent persons.

(iii) The issue of dependency shall be subject to review by the commission at the end of the initial six-year period and annually thereafter. If in any such review it is determined that, under the facts and circumstances existing at that time, the applicant is no longer a wholly dependent person, the applicant may be considered a partly dependent or nondependent person and shall be paid such benefits as the commission may determine under Subsection (2) (b) (ii).

(iv) For purposes of any dependency determination, a surviving spouse of a deceased employee shall be conclusively presumed to be wholly dependent for a six-year period from the date of death of

the employee. This presumption shall not apply after the initial six-year period and, in determining the then existing annual income of the surviving spouse, the commission shall exclude 50% of any federal Social Security death benefits received by that surviving spouse.

(b) (i) If there are partly dependent persons at the time of the death, the payment shall be 66-2/3% of the decedent's average weekly wage at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week. Compensation shall continue during dependency for the remainder of the period between the date of death and the expiration of six years or 312 weeks after the date of injury as the commission in each case may determine. Compensation may not amount to more than a maximum of $30,000. The benefits provided for in this subsection shall be in keeping with the circumstances and conditions of dependency existing at the date of injury, and any amount awarded by the commission under this subsection shall be consistent with the general provisions of this title.

(ii) Benefits to persons determined to be partly dependent under Subsection (2) (a) (iii) shall be determined by the commission in keeping with the circumstances and conditions of dependency existing at the time of the dependency review and may be paid in [~~a weekly~~] an amount not exceeding the maximum weekly rate that partly dependent [~~person~~] persons would receive if wholly dependent.

(iii) Payments under this section shall be paid to such persons during their dependency by the employer or its insurance carrier.

(c) If there are wholly dependent persons and also partly dependent persons at the time of death, the commission may apportion the benefits as it considers just and equitable; provided, that the total benefits awarded to all parties concerned do not exceed the maximum provided for by law.

[~~(d) If there are wholly or partly dependent persons at the time of death and the total amount of the awards paid by the employer or its insurance carrier to said dependents, prior to the termination of dependency, including any remarriage settlement, does not exceed $30,000, the employer or its insurance carrier shall pay the difference between the amount paid and $30,000 into the Employers' Reinsurance Fund provided for in Subsection (1).~~]

Tab 4

314, 1315 (Utah 1982); *Clark v. American Standard, Inc.*, 583 P.2d 618, 620 (Utah 1978). A third party who benefits only incidentally from the performance of a contract has no right to recover under that contract. *Mel Trimble Real Estate v. Fitzgerald*, 626 P.2d 453, 454 (Utah 1981); *Rio Algom Corp.*, 618 P.2d at 506; *Tracy Collins*, 652 P.2d at 1315; *Schwinghammer*, Utah 2d at 420, 446 P.2d at 415.

Nothing in the bond indicates that Fletcher or Northwestern intended to confer on plaintiff the right to enforce payment. The bond only lists Atlas and Check Rite as obligees. Plaintiff argues that because the purpose of the bond is to safeguard against the presentation of the lost certificate, she is an intended beneficiary. Plaintiff, however, overlooks the fact that the bond is intended to safeguard and indemnify *Atlas and Check Rite* against a future claim on the lost certificate. It is not intended to protect plaintiff from purchasing a stock certificate that has been reported lost or stolen. Performance on the bond only incidentally benefits plaintiff by providing a fund from which her damages may ultimately be paid.

Since plaintiff is not a third-party beneficiary on the bond, we affirm the trial court's dismissal of Count IV.

The judgment in favor of plaintiff and against Atlas and Check Rite for conversion and wrongful refusal to transfer stock is affirmed. The trial court's denial of defendant's motion to strike plaintiff's affidavits and the dismissal of plaintiff's third, fourth, and fifth claims is also affirmed. The award of attorney fees to plaintiff is reversed.

HALL, C.J., HOWE, Associate C.J., ORME and ZIMMERMAN, JJ., concur.

Marilyn R. HALES, Widow; Delbert R. Hales, Monica M. Hales, and Cristal E. Hales, Minor Dependent Children; and Robyn L. Chambers, Former Wife of David K. Hales, deceased, Petitioners,

v.

The INDUSTRIAL COMMISSION OF UTAH; Emery Mining Corporation, aka Utah Power & Light Company; and Energy Mutual Insurance Co., Respondents.

No. 920319-CA.

Court of Appeals of Utah.

April 23, 1993.

Petitioners sought review of Industrial Commission's order denying their motion for review of administrative law judge's denial of dependent death benefits. The Court of Appeals, Orme, J., held that workers' compensation statute of repose which provided death benefits to dependents only when work-related injury caused death within six years of accident was unconstitutional under open courts provision.

Reversed and remanded.

1. Administrative Law and Procedure ⇐663

Workers' Compensation ⇐1828

Administrative law judge's decision that workers' compensation claims were barred, and Industrial Commission's review thereof, constituted formal adjudicative proceedings which were properly reviewed by Court of Appeals. U.C.A.1953, 63-46b-4, 63-46b-16.

2. Appeal and Error ⇐893(1)

Whether statute is constitutional presents question of law which Court of Appeals considers de novo.

3. Workers' Compensation ⇐39

Workers' compensation statute of repose which provided death benefits for dependents of injured employee only when work-related injury caused death within six years of accident was unconstitutional un-

der open courts provision, as there was no effective and reasonable alternative remedy for dependents; provision allowing discretionary recovery against special fund applied only to dependents who had been receiving benefits in their own right and discretionary extension of benefits was not remedy constitutionally equivalent to right to receive benefits. Const. Art. 1, § 11; U.C.A.1953, 35-1-68(2), 35-1-70.

Virginius Dabney (argued), Salt Lake City, Dabney & Dabney, P.C., for petitioner.

Rinehart L. Peshell (argued), Fairbourn & Peshell, Midvale, for respondents, Emery Min. & Energy Mut.

Benjamin A. Sims, General Counsel, Industrial Commission of Utah, Salt Lake City, for Industrial Com'n of Utah.

Before BENCH, BILLINGS and ORME, JJ.

OPINION

ORME, Judge:

Petitioners appeal the Industrial Commission's order denying their motion for review of an administrative law judge's decision holding they were not entitled to dependent death benefits. The basis of petitioners' appeal is that the statute under which their claims were denied, Utah Code Ann. § 35-1-68(2) (1979), is an unconstitutional statute of repose. We agree and accordingly reverse the Commission's order.[1]

FACTS

David K. Hales sustained a compensable injury on May 24, 1982, while employed by Emery Mining Corporation. He was initially paid temporary, total disability compensation and was awarded 32% permanent, partial disability compensation for orthopedic and internal medical problems, anxiety, depression, and intractable pain. Eventually, he was awarded permanent, total disability compensation. Mr. Hales died on November 25, 1988, more than six years after the accident.

Petitioners allege that the cause of Mr. Hales's death was his industrial accident and, as required by Utah Code Ann. § 35-1-68(2)(a) (1979), they filed dependents' death claims within one year of the date of his death. Emery Mining Corporation, Mr. Hales's employer, and its workers' compensation insurance carrier, Energy Mutual Insurance Company, denied responsibility for death benefits based on the time limitation found in Utah Code Ann. § 35-1-68(2) (1979), which provides, in part:

> In case injury causes death within the period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of the deceased as provided in section 35-1-81, and further benefits [provided in subsequent subsections of section 68, including payments to the deceased's dependents].

[1] On April 3, 1992, the administrative law judge held that petitioners' claims were indeed barred by this statute because Mr. Hales died more than six years after the accident that allegedly caused his death. On April 17, 1992, petitioners filed a motion for review with the Commission alleging that the statutory provision in section 35-1-68(2) violated the Utah Constitution's open courts provision by extinguishing their constitutional right to litigate a valid claim before their right to file that claim arose. *See* Utah Const. art. I, § 11. On May 6, 1992, the Commission affirmed the administrative law judge's decision. In so doing, the Commission noted the likelihood that it would be reversed by this court on the authority of *Wrolstad v. Industrial Commission*, 786 P.2d 243 (Utah App.), *cert. denied*, 795 P.2d 1138 (Utah 1990), and *Velarde v. Industrial Commission*, 831 P.2d 123 (Utah App.1992), but ex-

1. Because we find the section an unconstitutional statute of repose, we need not address petitioners' second argument that the provision violates their equal protection rights under the Utah Constitution. *See Velarde v. Industrial Comm'n*, 831 P.2d 123, 130 (Utah App.1992); *Wrolstad v. Industrial Comm'n*, 786 P.2d 243, 244 (Utah App.), *cert. denied*, 795 P.2d 1138 (Utah 1990).

pressed the view it had no power to rule on the statute's constitutionality.[2]

STANDARD OF REVIEW

[2] The Utah Administrative Procedures Act permits us to grant relief if the petitioners have been substantially prejudiced because "the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied." Utah Code Ann. § 63–46b–16(4)(a) (1989). Whether the statute is constitutional presents a question of law which we consider de novo. *See Velarde,* 831 P.2d at 125.

ISSUE ON APPEAL

[3] Petitioners assert that Utah Code Ann. § 35–1–68(2) (1979), and the various versions thereof subsequently enacted in the course of amendment and recodification, is an unconstitutional statute of repose in violation of Article I, Section 11, of the Utah Constitution. Section 35–1–68(2) provides that employers or their insurance carriers shall pay death benefits to dependents only when the work-related injury causes death within the period of six years from the date of accident." Petitioners claim this statute leaves dependents without a remedy if an injured worker survives more than six years from the date of his industrial injury and then dies. Because the statute terminated the dependents' cause of action before it arose, petitioners argue, the statute acts as one of repose. Furthermore, petitioners argue that no adequate, alternative remedy exists and thus the statute of repose is unconstitutional. *See Berry v. Beech Aircraft Corp.,* 717 P.2d 670, 680 (Utah 1985).

ANALYSIS

A. Introduction

The difference between a statute of limitations and a statute of repose is that

> [a] statute of limitations requires a lawsuit to be filed within a specified period of time after a legal right has been violated or the remedy for the wrong committed is deemed waived. A statute of repose bars all actions after a specified period of time has run from the occurrence of some event other than the occurrence of an injury that gives rise to a cause of action.

Berry v. Beech Aircraft Corp., 717 P.2d 670, 672 (Utah 1985). "A statute of repose ... prevents suit a statutorily specified number of years after a particular event occurs, without regard to when the cause of action accrues." *Velarde v. Industrial Comm'n,* 831 P.2d 123, 125 (Utah App. 1992). An action accrues, generally, "upon the happening of the last event necessary to complete the cause of action." *Becton Dickinson & Co. v. Reese,* 668 P.2d 1254, 1257 (Utah 1983).

In the instant case, petitioners' cause of action accrued upon the death of Mr. Hales, yet the six-year period of section 35–1–68(2) had already run so as to bar the assertion of their claim. Consequently, section 35–1–68(2) acts as a statute of repose. *See Velarde,* 831 P.2d at 126–27 (statute denying silicosis death benefits unless death results within three years from last day employee worked held to be unconstitutional statute of repose). Unless the law provides an "effective and reasonable" alternative remedy, the statute is unconstitutional. *Berry,* 717 P.2d at 680.[3]

2. The Industrial Commission also expressed confusion as to whether judicial review of its decision would be initially in this court or by trial de novo in the district court. The administrative law judge's decision and the Industrial Commission's review constitute formal adjudicative proceedings. *See* Utah Code Ann. § 63–46b–4 (1989). Review is properly in this court. Utah Code Ann. § 63–46b–16 (1989). *See, e.g., Velarde v. Industrial Comm'n,* 831 P.2d 123 (Utah App.1992); *Wrolstad v. Industrial Comm'n,* 786 P.2d 243 (Utah App.), *cert. denied,* 795 P.2d 1138 (Utah 1990). No purpose would be served by a trial de novo in the district court where the relevant facts are not in dispute and the issue is solely one of law. *Cf. Alumbaugh v. White,* 800 P.2d 825 (Utah App.1990) (per curiam) (disputed factual finding, made without formal hearing, reviewed by trial de novo in district court).

3. If there is no substitute or alternative remedy provided, the statute of repose may be justified only if there is a "clear social or economic evil to be eliminated" and the means selected to remedy the evil are not "arbitrary or unreason-

Respondents argue that section 35–1–68 does not violate the open courts provision of the Utah Constitution "because Petitioners can still pursue their claims against the Employers Reinsurance Fund," formerly the second injury fund. Respondents claim section 35–1–68(2) does not cut off the claims of the deceased's dependents, but merely limits the liability of the employer or insurance carrier for death benefits to the period of six years from the date of the employee's injury. As to benefits payable after the six years, dependents have an alternative remedy by pursuing their claims against the special fund, provided for in section 35–1–68(1), under Utah Code Ann. § 35–1–70 (1988).

Section 70 provides, in its entirety, as follows:

> If any wholly dependent persons, *who have been receiving the benefits of this title,* at the termination of such benefits are yet in a dependent condition, and under all reasonable circumstances should be entitled to additional benefits, the industrial commission may, in its discretion, extend indefinitely such benefits; but the liability of the employer or insurance carrier involved shall not be extended, and the additional benefits allowed shall be paid out of the special fund provided for in Subdivision (1) of Section 35–1–68.

Utah Code Ann. § 35–1–70 (1988) (emphasis added).

Respondents argue that petitioners were receiving benefits under "this title," and thus have an alternative remedy pursuant to section 35–1–70, because Mr. Hales was receiving permanent, total disability benefits under Utah Code Ann. § 35–1–67 (1988). That section states that an "employee shall receive" compensation which

> may not be more than 85% of the state average weekly wage at the time of the injury ... [and] may not be less than the sum of $45 per week, *plus $5 for a dependent spouse, plus $5 for each dependent child under the age of 18 years,* up to a maximum of four such dependent minor children....

Utah Code Ann. § 35–1–67 (1988) (emphasis added).

Based upon the above quoted statutes, respondents argue that although the employee receives the check under section 67, the dependents are included in the calculations determining benefits and the dependents, therefore, are receiving benefits, albeit through the injured employee. Consequently, respondents continue, petitioners were receiving benefits pursuant to section 35–1–70 and may proceed against the special fund provided for in section 35–1–68(1). Respondents conclude that even if section 68(2) extinguishes petitioners' death benefit claims *against the employer* before they arise, this alternative remedy available to them through section 35–1–70 precludes section 35–1–68(2) from being unconstitutional. Respondents bolster their argument by submitting that if section 35–1–70 did not apply in the instant case, it would never apply.

Petitioners respond by arguing that just because the minimum permanent disability compensation *an employee* may receive pursuant to section 35–1–67 includes, as part of the calculation, $5 for a dependent spouse plus $5 for each dependent minor child, the dependents here were not necessarily "receiving the benefits" for purposes of section 35–1–70. Furthermore, petitioners submit, without contravention, that Mr. Hales's disability pay did not include the $5 per dependent allowance referred to in section 35–1–67 because he was collecting the maximum weekly rate without the additional dependents' allowance being considered.

By analyzing both the scheme of the relevant statutes and their history, we conclude that section 35–1–70 does not provide the beneficiaries with an "effective and reasonable alternative remedy." *Berry,* 717 P.2d at 680.

B. Statutory Scheme

The statutory scheme specifically distinguishes between employee payments and

able." *Berry,* 717 P.2d at 680. Respondents do not argue that there is any social or economic evil to be eliminated and, therefore, the issue is confined to whether a reasonable alternative remedy is available.

payments to dependents. Section 35–1–66 sets out the compensation that an "*employee* ... may receive" for his or her permanent, partial disability. Utah Code Ann. § 35–1–66 (1988) (emphasis added). Similarly, section 35–1–67 outlines the disability payments an "*employee* shall receive." Utah Code Ann. § 35–1–67 (1988) (emphasis added). Both sections provide that the *minimum* compensation a worker shall receive is to be a sum certain plus $5 if the worker has a dependent spouse, plus $5 for dependent children under 18, up to a maximum of four such dependent children. The *maximum* compensation allowed by these sections, which is what Mr. Hales apparently received, makes no reference to dependents and is based on an entirely different formula. Just because the existence of a dependent spouse or dependent children increases the *minimum* compensation a partially or totally disabled *employee* receives, it does not follow that those dependents are receiving benefits for purposes of section 35–1–70. There is no requirement that the additional $5 be paid over to or used for the benefit of the dependents. By contrast, section 35–1–68 specifically provides for benefits that are paid to *dependents*. *See* Utah Code Ann. § 35–1–68(2) (1988). Thus, section 35–1–70 applies only to dependents who have been receiving benefits in their own right.

A historical review of sections 35–1–70 and 35–1–68 confirms our conclusion that receipt of disability payments by an injured employee *with* dependents does not constitute receipt of benefits *by* dependents for purposes of section 35–1–70.

C. Statutory History

The predecessor of the present dependent death benefits statute, Utah Code Ann. § 35–1–68 (1988), was first enacted by the Utah Legislature in 1917. 1917 Utah Laws ch. 100, § 79. That original statute provided death benefits to dependents, paid by the employer or its insurer, for the period "between the date of the death, and six years after the date of the injury," but no longer. 1917 Utah Laws ch. 100, § 79(2). As originally adopted, the death benefits ended six years after the injury regardless of whether the spouse or child might still be dependent and in need.[4] Obviously in an attempt to remedy this harsh scheme, the 1917 death benefits statute was amended four years later to include the following language, which language is the statutory ancestor of the current section 35–1–70:

> If any wholly dependent persons, *who have been receiving the benefits of this Act*, and who, at the termination of such benefits are yet in a dependent condition, and under all reasonable circumstances, should be entitled to additional benefits, the industrial commission may, at its discretion, extend indefinitely such benefits; but the liability of the employer or insurance carrier involved shall not be extended, but the additional benefits allowed shall be paid out of the special fund provided for in subdivision 1 of this section.

1921 Utah Laws ch. 67, § 3140(7) (emphasis added).

The initial placement of the language of section 35–1–70 within the death benefits statute demonstrates that the phrase "receiving the benefits" referred to dependents receiving benefits—death benefits—in their own right; the provision has no relevance to dependents of employees who have been receiving disability benefits, but who have not themselves been receiving benefits. And this holds true even if the dependents have been taken into account in calculating the amount of disability benefits received by the employee.

In over seventy years since the words now found in section 35–1–70 were originally adopted, they have remained essentially unchanged. The only significant change has been that the provision was taken out of the predecessor of the death benefits section—section 68—and made its own self-standing section in 1933. Utah Rev.Stat. § 42–1–66 (1933). Although this provision

4. The failings of such a system are highlighted in the scenario where a dependent child was one year old at the time of the employee's injury and the benefits ended automatically, with no chance of extension, when the child was only seven years old.

for continuing death benefits in special cases has remained a self-contained provision up to the present day codification in section 35–1–70, its origin as a part of the death benefits section is significant.

Again, the 1921 amendment of the death benefits statute remedied the situation in which the six-year limitation had run, but an employee's survivors were still dependent and in need. This amendment allowed the Industrial Commission to extend benefits, at its discretion, for those dependent individuals. So long as death benefits as of right automatically ceased after the six year limitation, the escape valve provided in what is now section 35–1–70 was necessary to remedy injustices. However, in 1973 the death benefits statute was amended to automatically provide benefits "[f]ollowing the period during which the employer or its insurance carrier is required to pay benefits under this act ... during the period of their dependency." 1973 Utah Laws ch. 67, § 5 (codified as Utah Code Ann. § 35–1–68(4) (1973)). Under this 1973 amendment, death benefits were to be paid, after six years from the date of injury, from the special fund provided for in section 35–1–68(1) until the termination of dependency.[5] This amendment obviated the need for dependents to seek the discretionary extension of death benefits under section 35–1–70 because the benefits were now extended as of right, assuming only that the individual remained in a dependent condition. The 1973 amendment, automatically extending benefits, was recodified in 1979 as Utah Code Ann. § 35–1–68(2)(b)(ii) (1979), pursuant to legislation that further refined the calculation of benefits to be paid "following the expiration of the first six-year period." 1979 Utah Laws ch. 138, § 3.[6]

This legislative history reveals that the phrase "receiving the benefits" under section 35–1–70 was intended to refer to the beneficiary receiving benefits in his or her own right—i.e., death benefits payable to the dependent—not to the employee receiving other kinds of benefits calculated in part, and only where the maximum was not reached, with reference to dependents. Thus, section 35–1–70 simply does not apply to the instant case.[7]

D. Inadequate Alternative

Finally, even if we were to assume that section 35–1–70 somehow applies in this case, it does not save the statute of repose because it does not provide an effective and reasonable alternative remedy. The extension of benefits permitted under section 35–1–70 is wholly discretionary. This discretionary extension of benefits is not a remedy that is constitutionally equivalent to the *right* to receive death benefits that the statute of repose terminates before it has accrued.

CONCLUSION

For the foregoing reasons, the Commission's decision is reversed, as it predicted,

5. We express no definitive opinion on an issue likely to surface on remand, namely, whether petitioners' claim should have been asserted against the fund rather than respondents and, if so, whether their petition may now be amended to join the fund. We note, however, that section 35–1–68(2)(b)(ii) appears only to contemplate a *continuation* of death benefits by the fund in situations where the employer's responsibility has first been determined within the six-year period and does not appear to hold open the avenue of proceeding directly against the fund in situations, like this one, where death occurs outside the six-year period.

6. The former Utah Code Ann. § 35–1–68(2)(b)(ii) (1979) is now codified as § 35–1–68(2)(a)(ii) (Supp.1992). We note that none of the several amendments to this section have any bearing on our analysis. Our analysis and conclusion apply to all of the permutations of section 35–1–68.

7. Admittedly, under the present statutory scheme in which the extension of benefits beyond the six-year period is no longer discretionary with the Commission so long as death benefit recipients remain dependent, section 35–1–70 would rarely, if ever, be applied. It appears the section escaped repeal, as no longer necessary, by virtue of its separate section status. As a glance at the annotation notes will show, the Legislature has repeatedly tinkered with section 35–1–68, unmindful that, from 1973 on, those changes rendered section 35–1–70, to which no particular legislative attention seems to have been paid for over seven decades, quite unnecessary.